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For The Northern Mariana Islands
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6
7 IN THE UNITED STATES DISTRICT COURT
8 FOR THE
NORTHERN MARIANA ISLANDS

9 LI YING HUA, LI ZHENG ZHE and XU JING JI,) CASE NO. CV 05-0019

10	Plaintiffs,)	MOTION FOR SANCTIONS:
11	vs.)	DEFAULT JUDGMENT AGAINST
12	JUNG JIN CORPORATION, a CNMI corporation,)	JUNG JIN CORPORATION AND ASIA
13	ASIA ENTERPRISES, INC., a CNMI corporation,)	ENTERPRISES, INC.
14	PARK HWA SUN and KIM HANG KWON,)	Date: Thursday, May 25, 2006
	Defendants.)	Time: 8:30 a.m.
)	Judge: Hon. Alex R. Munson

15 MOTION

16 COMES NOW, LI YING HUA, LI ZHENG ZHE and XU JING JI, the Plaintiffs, by and
17 through their attorney, with a Motion for Sanctions. This Motion is brought pursuant to Rule
18 55(b)(2) of the Federal Rules of Civil Procedure, and is supported by the pleadings and records in
19 this matter and by the declaration submitted herewith. For the reasons stated below, Plaintiffs
20 respectfully request that the Court grant Plaintiffs' Motion, strike the answers of and enter
21 judgment by default against JUNG JIN CORPORATION and ASIA ENTERPRISES, INC.
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23 MEMORANDUM IN SUPPORT OF MOTION

24 This Honorable Court entered an order granting the withdraw of Stephen J. Nutting on
25 March 3, 2006. In that Order, this Court admonished the defendants that corporations cannot
26 appear *pro se* in federal court. The corporate defendants were given until 3:30 p.m. March 17, 2006
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1 to retain counsel and to have said counsel file a notice of appearance with this court. As of the date
2 of the filling of this Motion, the corporate defendants have failed to retain new counsel and no one
3 has filed a notice of appearance for the two corporate defendants. This Court indicated that such
4 a failure to secure counsel may result in sanctions, including entry of default.

5 **I. DEFAULT JUDGMENT IS APPROPRIATE AS A SANCTION FOR FAILURE TO
6 ACQUIRE COUNSEL AS ORDERED BY THIS COURT**

7 Default may be entered by the Court as a sanction for misconduct arising from the failure
8 to acquire counsel despite orders by the district court to do so. *See, e.g., Eagle Assocs. v. Bank of*
9 *Montreal*, 926 F.2d 1305, 1308 (2nd Cir. 1991) (willful disregard to appear through counsel rather
10 than layperson). The entry of a default judgment has also been found to be “perfectly appropriate”
11 where a defendant fails to secure counsel for the duration of litigation. *United States v. High County*
12 *Broadcasting Company, Inc.*, 3 F.3d 1244, 1245 (9th Cir. 1993).

13 A party seeking a default judgment must state a claim upon which it may recover. *PepsiCo*
14 *Inc. v. Cal. Sec. Cans*, 238 F. Supp. 2d 1172 (C.D. Cal. 2002). After a default has been entered by
15 the court clerk, the well-pleaded factual, allegations of the complaint are taken as true, except for
16 those allegations relating to damages. *Televideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917 (9th Cir.
17 1987); *Discovery Communications, Inc. v. Animal Planet, Inc.*, 172 F. Supp. 2d 1282, 1288 (C.D. Cal.
18 2001). Plaintiff is required to prove all damages sought in the complaint. In addition, “[a]
19 judgment by default shall not be different in kind [or] exceed in amount that prayed for in the
20 [complaint].” Fed. R Civ. P. 54(c). In determining damages, a court can rely on the declarations
21 submitted by the plaintiff or order a full evidentiary hearing. Fed. R Civ. P. 55(b)(2).

22 **II. PLAINTIFFS’ CLAIMS FOR DAMAGES**

23 Plaintiffs’ burden in “proving up” damages is relatively lenient. If proximate cause is
24 properly alleged in the complaint, it is admitted upon default. *Greyhound Exhibitgroup, Inc. v.*

1 *E.L.U.L Reality Corp.*, 973 F.2d 155, 159 (2nd Cir. 1992). Injury is established and plaintiff need
 2 prove only that the compensation sought relates to the damages that naturally flow from the injuries
 3 pled. *Wu v. Ip*, 1996 U.S. Dist. LEXIS 10658, No. C93-4467 FMS, 1996 WL 428342 at *1 (N.D.
 4 Cal. 1996) (citing *Greyhound Exhibitgroup, Inc.*, 973 F.2d at 159). However, if the facts necessary
 5 to determine damages are not contained in the complaint, or are legally insufficient, they will not
 6 be established by default. *See Cripps v. Life Ins. Co. of N. America*, 980 F.2d 1261, 1267 (9th Cir.
 7 1992).

8 **A. Fair Labor Standards Act Overtime Claims and Liquidated Damages:**

9 In the Commonwealth, any employer who violates the provisions of section 207 of the Fair
 10 Labor Standards Act, 29 U.S.C. §§ 201 *et seq.* (“FLSA”) shall be liable to the employee or employees
 11 affected in the amount of their unpaid overtime compensation and in an additional equal amount
 12 as liquidated damages. 29 U.S.C. §§ 216(b). “Liquidated damages are compensatory, not punitive
 13 in nature.” *E.E.O.C. v. First Citizens Bank of Billings*, 758 F.2d 397, 403 (9th Cir. 1985), *cert. den’d*,
 14 474 U.S. 902, 88 L. Ed. 2d 228, 106 S. Ct. 228 (1985). The FLSA originally made such damages
 15 mandatory. *See Overnight Motor Transportation Co. v. Missel*, 316 U.S. 572, 581, 62 S. Ct. 1216,
 16 1220, 86 L. Ed. 1682 (1942). However, the Portal-to-Portal Act, 29 U.S.C. §§ 260 *et seq.*, made
 17 doubling discretionary rather than mandatory by permitting a court to withhold liquidated damages
 18 in an action to recover unpaid minimum wages “if the employer shows . . . that the act or omission
 19 giving rise to such action was in good faith and that he had reasonable grounds for believing that
 20 his act or omission was not a violation of the [FLSA].”¹

25

 26 ¹ However, there is still “a strong presumption in favor of doubling.” *Walton v. United*
 27 *Consumers Club, Inc.*, 786 F.2d 303, 310 (7th Cir. 1986).

1 An employer bears a “substantial burden” in proving this defense, which contains what have
2 been described as subjective and objective components. *Brock v. Shirk*, 833 F.2d 1326, 1330 (9th Cir.
3 1987), *vacated on other grounds*, 488 U.S. 806 (1988). “To satisfy the subjective ‘good faith’
4 component, the [County was] obligated to prove that [it] had ‘an honest intention to ascertain what
5 [the FLSA] requires and to act in accordance with it.’” *Shirk*, 833 F.2d at 1330 (quoting *First*
6 *Citizens Bank*, 758 F.2d at 403). If the employer fails to meet this burden, a court must award
7 liquidated damages. *Id.* at 1331; *First Citizens Bank*, 758 F.2d at 403. “Double damages are the
8 norm, single damages the exception.” *Chao v. A-One Medical Services, Inc.*, 346 F.3d 908, 919-20
9 (9th Cir. 2003) quoting *Local 246 Util. Workers Union v. S. Cal. Edison Co.*, 83 F.3d 292, 297 (9th
10 Cir. 1996).
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13 In *Alvarez v. IBP, Inc.*, 339 F.3d 894, 910 (9th Cir. 2003) the court stated:
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16 To satisfy § 260, a FLSA-liable employer bears the “difficult” burden of
17 proving both subjective good faith and objective reasonableness, “with double
18 damages being the norm and single damages the exception.” *Herman*, 172 F.3d at
19 142 (citing *Reich v. S. New Eng. Telecomm. Corp.*, 121 F.3d 58, 71 (2nd Cir. 1997));
20 *see also Dole v. Elliott Travel & Tours*, 942 F.2d 962, 968 (6th Cir. 1991). Where the
21 employer “fails to carry that burden,” we have noted, “liquidated damages are
22 mandatory.” *Local 246*, 83 F.3d at 29 (citations omitted).
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24 IBP “failed to take the steps necessary to ensure [its] [] practices complied
25 with [FLSA].” *Herman*, 172 F.3d at 142. Mistaking ex post explanation and
26 justification for the necessary affirmative “steps” to ensure compliance, IBP offers no
27 evidence to show that it *actively endeavored to ensure such compliance*.
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1 In a case from the Ninth Circuit the same year, the court held:

2 Even if we were to ignore our finding of willfulness, there are not sufficient facts to
3 support a finding of good faith on the part of the Appellants. If, for example, the
4 Appellants had secured some objective authority, or at the very least sought advice,
5 on the legality of treating A-One and Alternative as separate employers for the
6 purpose of calculating overtime, we would have a different case. *See, e.g., Elwell v.*
7 *Univ. Hosps. Home Care Servs.*, 276 F.3d 832, 841 (6th Cir.2002) (“Nor has [the
8 defendant] suggested that it was relying on the expertise or opinion of any other
9 person or entity with knowledge of the FLSA regulations, including its attorney or the
10 Department of Labor.”); *Samson v. Apollo Res., Inc.*, 242 F.3d 629, 641 (5th
11 Cir.2001) (approving a finding of good faith where the employer consulted with the
12 Department of Labor.) Black's reckless belief that formal separation of the two
13 entities would justify nonpayment of overtime wages is legally insufficient as a good
14 faith defense.

15 *Chao v. A-One Medical Services, Inc.*, 346 F.3d at 920.

16 Additionally, here the Plaintiffs' complaint alleges in ¶ 40 that all of the actions and
17 omissions were willful. This now being deemed admitted would allow this Court a further basis to
18 award liquidated damages. In any case: “[Even] [a] finding that the employer did not act willfully
19 does not preclude an award of liquidated damages.” *Cox v. Brookshire Grocery Co.*, 919 F.2d 354,
20 356 (5th Cir.1990)(citation omitted). *See also Peters v. City of Shreveport*, 818 F.2d 1148, 1167 (5th
21 Cir. 1987), *cert. den'd*, 485 U.S. 930, 99 L. Ed. 2d 264, 108 S. Ct. 1101 (1988).

22 **B. Statutory Liquidated Damages for Breach of Contract:**

23 In any action taken directly by or on behalf of a nonresident worker,
24 notwithstanding any other remedies that may apply the worker that prevails in such
25 action shall recover unpaid wages and overtime compensation, an additional equal
26 amount as liquidated damages, and court costs. In all cases the court shall, as part of
27 the judgment, render a finding as to the merits of the action. The filing of an action
which is determined by the court to be unfounded or without merit shall be
considered a material breach of contract and shall prevent reentry into the
Commonwealth by the nonresident worker in the event the nonresident worker

1 attempts reentry into the Commonwealth within five years from the date of the
2 court's decision. Any employer who violates the provisions of this chapter or breaches
3 an employment contract with a nonresident worker, in addition to any other
4 damages which may be awarded the nonresident worker by the court, shall be
5 awarded reasonable attorney fees. However, attorney fees shall not be recoverable
6 against the Commonwealth.

7 3 C.M.C. § 4447(d) (2000).

8 Here, under both the FLSA and for their breach of contract claims, Plaintiffs are entitled,
9 as a matter of law, to the following damages:

10 1. Their respective claims for wages, including overtime premiums due, for all hours worked
11 less wage payments received free and clear;

12 2. Their respective claims for their for the defendants' breach of Plaintiffs' employment
13 contracts, including damages for unpaid wages at the contractual rate, prospective contract wages,
14 the return of illegal deductions, liquidated damages, costs and reasonable attorney's fees, where
15 applicable;

16 3. Their respective claims for liquidated damages under the FLSA; and

17 4. Their claim for a reasonable attorney's fee and costs of this action under the FLSA.

18 These damages are detailed and calculated in Exhibit "A" to the Declaration of Counsel for
19 Plaintiffs, and in the declarations of the Plaintiffs and the exhibits thereto, submitted herewith.
20 The amount of damages due to the plaintiff Lin Ying Hua is \$47, 662.52, Plaintiff Xu Jing Ji in the
21 amount of \$38,857.28 and Plaintiff Li Zheng Zhi in the amount of \$81,773.00 for a total amount
22 of the judgement for \$168,292.80. This figure is exclusive of the reasonable attorneys fee and costs
23 of this action.

III. JOINT AND SEVERAL LIABILITY

After a default has been entered by the court clerk, the well-pleaded factual allegations of the complaint are taken as true, except for those allegations relating to damages. *Televideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917 (9th Cir. 1987); *Discovery Communications, Inc. v. Animal Planet, Inc.*, 172 F. Supp. 2d 1282, 1288 (C.D. Cal. 2001).

In this matter, the Plaintiffs have alleged in their Complaint, among other allegations, that JUNG JIN and ASIA were joint employers and successors in interest to one another and that JUNG JIN and ASIA are jointly and severally liable for the Plaintiffs' claims. Complaint, ¶¶ 14-15. The defendants are further alleged to be an "enterprise" within the meaning of § 203(r)(1) of the FLSA. Complaint, ¶ 25. This Court, in taking the well pled allegations in the Plaintiffs' Complaint as true, should find that these defendants are jointly and severally liable.

CONCLUSION

For the above state reasons, the Plaintiffs respectfully requests that this Court grant this Motion for Sanctions, striking the answers of the defendants JUNG JIN CORPORATION and ASIA ENTERPRISES, INC., and entering judgment by default against the two defendants awarding damages to Plaintiffs in the amount of \$168,292.80, plus an award of reasonable attorneys' fees and costs of this action, and that the two defendant corporations be held jointly and severally liable for these amounts together with post judgment interest at the legal rate. In the alternative, the Plaintiffs would respectfully request that this Court strike their answers, enter judgment by default against these two defendants, finding them jointly and severally liable for damages, and hold an

1 evidentiary hearing to establish Plaintiffs' damages or any other facts if the Court deems Plaintiffs'
2 declarations submitted herewith and other evidence in the record insufficient to establish any
3 necessary fact or facts.
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5 Respectfully submitted this 21st day of April, 2006.

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